exhausted his right of appeal to a Court of law. The appeal should therefore be allowed and the application for leave granted.

From the authorities cited, the trend would be towards a liberal approach in tackling the question of judicial review in respect of *certiorari*. The need to exhaust the domestic remedies should not fetter the discretion of the High Court in granting leave "where there are very exceptional circumstances or a clear lack of jurisdiction or a blatant failure to perform some statutory duty or where there are serious breaches of the principles of natural justice." I am satisfied that there are sufficient grounds, without embarking on the substantial merits of the case, for leave to be granted to the applicant. The applicant has successfully showed *prima facie* that his application is not frivolous or vexatious. Consequently, all the proceedings and actions made in pursuance of the court-martial be stayed and further, that the respondents to supply a copy of the record of proceedings to the applicant. The costs of these proceedings should rightly go to the applicant.

The learned Federal Counsel now files an appeal.

LEE CHOO YAM HOLDINGS SDN. BHD. & 2 ORS.

v.

KHOO YOKE WAH & 6 ORS. AND TAI KWONG GOLDSMITHS & JEWELLERS (IN RECEIVERSHIP) AND TETUAN SAHERAN & WOON & ORS. (INTERVENERS)

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[SUIT NO. 02-24(31)-198-88]
19 APRIL 1993

PARTNERSHIP: Dissolution - Court appointed receiver - Equity to operate in the partners' interests - Paramount consideration of a Court of equity in appointing receiver - Liability of receiver to pay pressing debts - Instance of appointment of receiver not to operate as injunction against all 3rd party claims - Sections 41, 46 Partnership Act 1961 - Dissolved partnership - Priority for payment out of debts by receiver appointed by partners - Whether all debts to rank pari passu - Whether receivers liable to pay on garnishee orders absolute forthwith - Whether employees of partnership have priority over other unsecured creditors - Dissolved state not equivalent to bankrupt state - Section 46 Partnership Act - Section 31 Employment Act 1955 - Section 43 Bankruptcy Act 1967.

PRACTICE & PROCEDURE: English principle applicable - English Law via s. 5 Civil Law Act 1956, prior to 7-4-56 on receivership - Common law in pari materia persuasive - Garnishee proceedings - Whether leave of court required to garnish funds in receiver's custody - Merits of case - Paramount consideration of Court - Terms of the order appointing receiver - Statute under which receiver is appointed - Body corporate position distinguished from partnership _ Orders 45, 46, 49 Rules of High Court 1980 - Sections 226, 227, 292 Companies Act 1965 distinguished.

This is a case of an application by the receiver asking for directions from the Court of origin which appointed the receiver, subsequent to encountering the execution of two garnishee orders absolute totalling a sum of RM32,815.85 obtained by two of the seventeen (2nd) Interveners in the KL Sessions Courts by way of writ of seizure and sale against the garnishee, the 1st intervener, who held the fund of RM1,144.482.10 for the receiver as stakeholders, upon a

successful sale by the receiver approved by the Court, of the assets of the dissolved partnership commonly called "Tai Kwong".

Meantime injunction orders had been issued on the *ex parte* application of the receiver to restrain the rest of the 2nd interveners from further proceeding in the lower courts with their respective claims, pending the outcome of the receiver's application *inter alia* for directions as to the ranking of priority of who should be paid first, whether the retrenched employees' claims under Labour Court Order No. KBKL/286/90 or the unsecured claims of the 2nd Interveners as cash depositors of Tai Kwong.

The issues before the Court were as follows:

(1) Whether the 2nd Interveners could lawfully execute judgment against Tai Kwong's receiver with garnishee proceedings without the leave of this Court;
(2) Whether the execution on such garnishee orders absolute obtained in other Courts, without having first obtained the leave of this court, constitute an interference with the receiver's duties as designated by this Court;
(3) The priority ranking between the retrenched employees' claims and the unsecured claims of the 2nd interveners cash depositors, who should rank first, if at all there is such a ranking;
(4) Should all claims against Tai Kwong including that of the 2nd interveners-cash depositors rank *pari passu* with all other debts and liabilities of Tai Kwong under s. 46, Partnership Act 1961.

Held:

[1] In distinguishing the case of *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* (S. C.) as a case decided *per incuriam*, that there is no general rule as seemingly and purportedly laid out in certain texts on the law of receivers and receivership, that with the appointment of a receiver by the court it operates as though it were an injunction effectively, against all 3rd party claims *vis a vis* the receiver, holding the assets of the partnership, unless and until leave of the original court is obtained.

[2] With regard to claims made against the receiver appointed by the court, whether leave of the original court is required or not, will depend on the merits of each case. Most importantly, the claimants e.g. the 2nd interveners in this case, must satisfy the court that there is no interference with the receiver's duties as designated by the court in paying out their debts forthwith in examining *inter alia* the terms of the order of appointment of the receiver and the relevant statute (s. 46 Partnership Act) under which the receiver has been appointed;

[3] This Court can find no legal impediment under the Rules of the Court nor under common law in its application of binding English principles prior to 7-4-56 on account of applying s. 5 Civil Law Act 1956 on the law of receivership in partnership matters to debar the 2nd interveners from executing judgment and/or their respective garnishee orders against the receiver's account to enforce payment forthwith of their pressing judgment debts outstanding.

[4] There can be no interference with the receivers' duties for the 2nd interveners to enforce payment out to them of their judgment debts owed, based on valid court orders, when it is the receiver's role in this instance as designated under the order appointing him to "make appropriate settlement and distributions thereunder (that is, s. 46 Partnership Act)".

[5] There is no such thing as priority ranking for the payment out of debts under the Partnership Act as distinguished from a body corporate situation covered e.g. under the Companies Act. Employees' claims may only claim statutory priority over claims if they fall within the provisos of s. 31 Employment Act.

[6] Section 46(b)(i) Partnership Act which is clear and unambiguous cannot be read to impose on the receiver a duty to pay debts and liabilities of the firm only on *pari passu* basis but the receiver can lawfully pay out pressing debts of the partnership based on valid orders of the Court, s. 43(4) Bankruptcy Act has no application to support the receiver's contention that *pari passu* distribution of such debts is mandatory, as there is a distinction between a dissolved firm and a bankrupt firm.

Cases referred to:

Wong Pot Heng v. Zainal Abidin Putih [1990] 2 CLJ 174/[1990] 2 MLJ 410 SC ***(cons)***
Re Rudd & Son Ltd. [1984] 2 AER 225 ***(cons)***
J. Kahn & Anor. v. Alli Mahomed Haji Umer [1892] ILR 15 p. 577 ***(cons)***
Re Maidstone Palace of Varieties Ltd. [1909] 2 Ch. 283 ***(cons)***
Ex parte Day: Re Potter [1883] 48 L T 912 ***(cons)***
Zainal Abidin Putih v. Che Wan Development Sdn. Bhd. [1992] 3 CLJ 1539/[1992] 2 MLJ 233, 241 ***(dist)***

De Winton v. The Mayor of Brecon [1859] 28 Beav 200 ***(cons)***
Yates v. Terry [1902] IKB 527 ***(foll)***
Re Cowan's Estate Rapier [1880] Vett 638 ***(foll)***
Ames v. Birkenhead Docks Trustees [1855] 20 Beav 332 ***(cons)***
Mitchell v. Weiss [1892] WN 139 ***(foll)***
Kewney v. Attrill [1886] Ch D 345 ***(cons)***
Ridd v. Thorne [1902] 2 Ch 344 ***(cons)***
Newport v. Pougher [1936] 1 Ch 214 ***(cons)***
Hwang Ju-In v. Huang Han Chao [1977] 2 MLJ 229 ***(foll)***
Lane v. Sterne [1862] 3 Giff 629 ***(cons)***

Legislation referred to:
Bankruptcy Act 1967, s. 43(3), (4)
Civil Law Act 1956, s. 5
Companies Act 1965
Cooperative Societies Act 1948
Employment Act 1955
Essential (Protection of Depositors) Regulations 1986, Reg. 13(1)
Partnership Act 1961, s. 46(b)(i)
Rules of the High Court 1980, O. 46 r. 2(1)
Partnership Act, s. 41 (India)
Bankruptcy Act 1914, s. 33(6) UK
Companies Act 1948, s. 317 (UK)
Partnership Act 1890, ss. 39, 41, 44 (UK)

Other sources referred to:
Halsbury's Laws, 4th Edn., Vol. 39 at p. 451-452
Managers and Administrators, (Butterworths 2nd Edn., 1990) by Hubert Picarda, p. 380

For the plaintiffs - Krishna Aiyar; M/s. Majid, Krishna, Menon & Lee
For the defendants - Fiona; M/s. Sri Ram & Co.
For the 1st intervener - S. Suhendran; M/s. Saheran & Woon
For the 2nd intervener - K.L. Wong; M/s. K.L. Wong & Co.
For the receivers - S.L. Lim; M/s. Riza Leong & Partners

[Ed. NOTE:

(1) The receiver has appealed to the Supreme Court vide Supreme Court Appeal No. 02-205-1993.

(2) The 1st intervener (garnishee) had also appealed to the Supreme Court vide Supreme Court Appeal No. 02-222-93 and on 1 December 1993 the appeal was withdrawn].

JUDGMENT

Anuar bin Dato' Zainal Abidin J:
This is an application (Encl. 145) by the court-appointed receiver of a dissolved firm, Tai Kwong Goldsmith & Jewellers by way of summons for directions with regard to the question of the priority of payments between the 2nd intervener and 16 others as the depositors of moneys with Tai Kwong and the former employees of the dissolved firm.

The facts of the case are as follows.

Three parties claim to have an interest in this application namely the receiver, the 1st intervener and the 2nd intervener. The 1st Intervener is M/s. Saheran & Woon who is the garnishee holding a sum of RM1,144,482.10 as stakeholders for the receiver in three lower court garnishee proceedings taken out by the 2nd intervener with 2 others. The 2nd intervener with 16 others are the depositors.

The 1st intervener obtained an order, *ex parte*, dated 30 September 1992, to intervene and an injunction restraining the 2nd intervener and one other (Foong May Ha @ Fong May Ha) from enforcing the garnishee order absolute obtained by them against the 1st intervener. Further it was ordered that the garnished sum of RM32,815.85 be deposited into a fixed deposit account which receipt be held by the Registrar of the High Court pending the determination of this application.

The receiver's complaints in his affidavit in reply (Encl. (186)) affirmed on 20 November 1992, against the 2nd intervener and 16 others are as follows:

1. That the 2nd intervener had obtained, despite arguments by the receiver for a stay, a garnishee order absolute on 12 February 1992, against a Tai Kwong bank account at Bangkok Bank Ltd. in part settlement of the 2nd intervener's judgment sum. (An appeal is pending on the receiver's application for stay);
2. That the 2nd intervener proceeded further to garnish for the balance settlement of the 2nd intervener's judgment sum of RM17,500 out of a stakeholder's sum of RM1,144,482.10 held by the 1st intervener. The garnishee order was made absolute on 2 February 1992 by the Sessions Court Judge despite objections from the receiver and the garnishee (the 1st Intervener). Both the receiver and the garnishee (1st Intervener) have appealed against the decision of the Sessions Court Judge;
3. That the 2nd intervener proceeded to execute the garnishee order absolute by way of writ of seizure and sale against the 1st

intervener when payment on demand was not forthcoming.

In the interim the receiver filed this application for directions. Pending the outcome of the application the receiver obtained *ex parte* orders dated 22 September 1992 for injunctions to restrain the 2nd intervener and two others with judgment sums, from further proceeding to execute the judgment. The receiver also obtained an injunction against the other interveners who have not obtained judgment from proceeding with their respective claims in lower courts, until the outcome of this application.

The 2nd intervener's reply in his Counsel's affidavits were as follows:

1. That the 2nd interveners executed garnishee order absolute against the 1st intervener on 28 September 1992, based on the contention that the injunction order obtained *ex parte* by the receiver dated 22 September 1992, did not bind him and that the subsequent injunction order obtained *ex parte* by the 1st intervener dated 30 September 1992, came too late to restrain the 2nd intervener as the relevant order absolute had already been executed by 28 September 1992. However the 2nd intervener and one other now complain that they are unable to obtain payment out of the execution sum amounting to RM32,815.85. This is on account of an application taken out by the 1st intervener in the Sessions Court for payment back of said sum. The matter is now pending the outcome of the present application.
2. That the 2nd intervener and 16 others have all intervened as their interests are affected by the order of injunction. A consent order allowing them to intervene was granted on 23 November 1992.
3. An application to set aside the order of injunction and other incidental orders has been filed by the 2nd interveners and 16 others and also to have the 1st intervener struck out as a party to these proceedings. This application is not the subject matter of this judgment.

In my view once the issue of priority of payment is resolved in this proceeding it would assist the court to decide whether or not the injunction orders should stay.

The relevant part of the order of this court dated 6 March 1990 appointing the receiver of Tai Kwong Goldsmith & Jewellers, reads:

> AND IT IS FURTHER ORDERED that Dato Rohailan B. Mohamed be and is hereby appointed the receiver of the said firm to get in and realise the assets, accounts and monies receivable by the firm and determine its liabilities for the purposes of a dissolution of the said business and to do all that is necessary and/or needful to undertake his task under s. 46 of the Partnership Act, and make appropriate settlement and distributions thereunder.

Section 46 of the Partnership Act 1961 reads:

> In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:
>
> (a) losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits; and
>
> (b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
>
> (i) in paying the debts and liabilities of the firm to persons who are not partners therein;
>
> (ii) in paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
>
> (iii) in paying to each partner rateably what is due from the firm to him in respect of capital; and
>
> (iv) the ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

The receiver is seeking a direction who should be paid first, whether the retrenched employees' claims pursuant to Labour Court Order No. KBKL/286/90 dated 6 July 1990, under the Employment Act 1955 or the unsecured claims of the cash depositors of Tai Kwong?

Other directions if necessary.

Costs of this application on a solicitor-client basis of the receiver to be paid out in priority of the proceeds of sale.

Both the learned Counsels for the receiver and the 1st intervener submit that from the unaudited accounts tendered through the receiver's supporting affidavit (Encl. 146) *vide* exhibit "DR-2" the debt liabilities of Tai Kwong far

exceed the cash in hand of the stakeholders (1st Intervener) of RM1,144,482.10 as follows:

(Draft) Statement of Accounts as at 20 April 1992

Total Outstanding Debts	Amount RM
Receiver's Expenses (Appendix I)	410,019.79
Employees' claim	187,583.31
Depositors (estimated)	6,248,071.00
Unsecured claims (Appendix II)	2,280,490.10
	RM9,126,164.29

It was submitted that the result obtained from this statement of accounts is that the creditors of Tai Kwong at best could only get RM0.10 in a dollar owed to each of them.

Further it was submitted that because there are no sufficient funds to distribute for settlement of all creditors, creditors should wait in line for distribution on a *pari passu* basis.

If that be the case no creditor, including the 2nd intervener and 16 others, can ever expect to obtain full payment of their claims from the partnership assets.

It was further argued that since the 2nd intervener and others also claim to have judgments against individual partners on the same deposit-claims they should proceed to execute their judgments against the individual partners and leave the partnership fund intact to enable the receiver to distribute the assets *pari passu*.

Both the learned Counsels for the receiver and the 1st intervener submit that "*pari passu*" distribution of the "assets of the firm" ought to be read into s. 46(b) of the Partnership Act 1961. The learned Counsels submitted that the common law of *pari passu* distribution of partnership assets has been established in a number of cases cited them: *Wong Pot Heng v. Zainal Abidin Putih* [1990] 2 MLJ 410 SC; *Re Rudd & Son Ltd.* [1984] 2 AER 225 and *J. Kahn & Anor. v. Alli Mahomed Haji Umer* [1892] ILR 15 p. 577.

Both the learned Counsels for the receiver and the 1st intervener have a common complaint against the 2nd intervener and the three others. Their complaint is that in garnishing the fund in the stakeholder's hand and obtaining payment thereof, without the leave of this court, it was an interference with the receiver's discharge of his duties under the order of Court dated 6 March 1990. For this reason there is justification for taking out of the various injunctions and the payment back of the money from the garnishors. Numerous authorities were cited and referred to this Court on this issue alone.

The learned Counsel for the 2nd intervener submits that at this juncture there is no basis for reading "*pari passu*" distribution into s. 46(b) of the Partnership Act 1961. She submits that there is no rule of priority ranking for payment out of debts in the same manner as set out in cases of companies under the Companies Act 1965 and other statutory body corporate. The learned Counsel sought to distinguish the cases cited by the learned Counsel for the receiver and the 1st intervener.

She submits that it is the duty of the receiver to pay out debts of the firm out of the assets of the firm under s. 46(b) of the Partnership Act 1961. The object of the Court in granting the order primarily is to protect the interests of the partners. There is therefore no interference with the receiver's discharge of duties in executing judgment against the partnership assets. In fact in so doing the interests of the partners are protected. If the 2nd intervener were to execute judgment against one or two of the partners it would bring about a highly inequitable position.

I think it is a euphemism to say that the 'receivers, as officers of the Court, are untouchables' no action can be instituted against them without leave of the Court. It is only the assets held or vested in the receivers which are "untouchables" where statute or any other law or regulation provide for how the receivables vested with the receivers should be distributed. The order appointing the receiver may provide or reserve priority ranking of payment out or distribution of the assets or receivables debt by the receivers.

It is only where the conduct or misconduct of the receiver is being put into question in any Court of law by a claimant against the receiver personally or in the manner of his conduct in discharging his duties that leave of the Court must be obtained. Leave of the original court appointing the receiver is required because it is only proper that, as the Court originally appointing the said receiver, it should be the proper forum to give direction, supervise or discipline if necessary and decide on any issue pertaining to the conduct of its own officers. (*Re Maidstone Palace of Varieties Ltd.* [1909] 2 Ch. 283 and *Ex Parte Day: Re Potter* [1883] 48 LT 912 applied).

In the case of *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* [1992] 2 MLJ 233, 241 the Supreme Court, in which I was sitting, held that -

> But the important point in this case was that as the appellants are officers of the Court, leave of the court should have been obtained to proceed against them ... and the case of *Re Maidstone Palace of Varieties Ltd.* was correctly cited by Counsel for the appellants in support of his submission that leave of the Court was necessary.

I have to admit that the law enunciated in that case may be over simplified. The issue is now much clearer having discussed and considered the cases in wider perspective. I am grateful to the learned counsels for their able argument. The whole spectrum of judicial pronouncements of the position of the law in England from the 19th Century right up to to-date on the Law of receivers and receivership have been examined and considered.

I am of opinion that, having traced the development of the law up to today, it is a wrong presumption of law to say that before any proceeding is taken out against court appointed receivers leave of the original court appointing him must first be obtained. Whether leave is or is not required will depend on the merits of each case.

The principle in *Re Maidstone Palace of Varieties Ltd.*, I now realised, was wrongly applied in *Zainal Abidin Putih v. Che Wan Development Sdn. Bhd.* In my view that case has not been fully argued and therefore the salient point in that case may have been missed thus leading the Supreme Court to apply the principle in *Zainal Abidin Putih's* case.

In *Re Maidstone Palace of Varieties* the receiver was appointed by the court in a debenture-holders' action. As a consequence to that order he took over management of a theatre and certain plant claimed by the respondent therein as their property. The respondent sued the receiver for payment of rentals for the use of the certain plant without which the receiver's use would tantamount to a trespass, "quite outside his office". As a result an injunction was also sought against the receiver. Neville J. in that case held at p. 286:

> It appears to me that a dispute of that kind is one which ... the court will deal with itself, and that it will not allow its officer to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by this conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court without the sanction of this Court.

It is clear that the issue before the Court is the conduct of the receiver in the discharge of the duties of his office. On that ground it was held that leave of the original court appointing him is mandatory before the action can proceed.

In *Zainal Abidin Putih's* case the conduct of the receiver is not in question. Similarly in the present case the conduct of the receiver is not an issue.

However, the conclusion of the Court in *Zainal Abidin Putih's* case that leave of court is required is correct but for a different reason. It is not the basis of the principle as laid down in *Re Maidstone Palace of Varieties Ltd.* but on the basis that payment of the costs of the litigant who is an unsecured creditor cannot possibly be allowed to supersede in priority over the costs of the receivers and other persons appointed under the regulations. Under Reg. 13(1) of Essential (Protection of Depositors) Regulations 1986 the payment of costs of the receivers and other persons appointed under the regulations has priority ranking over all other claims for costs including that of the unsecured creditor.

That decision must be distinguished from the case before me. In the present case s. 46(b)(i) specifically gives first priority of the application of partnership assets to pay for the firm's debts and liabilities to non-partners creditors. The duty of the receiver under s. 46(b)(i) is therefore to apply the partnership assets to first pay the firm's debts and liabilities to the firm's creditors in priority over other claims.

This provision must therefore be distinguished from Regulation 13(1) of the Essential (Protection of Depositors) Regulations 1986. There are other distinguishing factors between a dissolved partnership firm under receivership and a body corporate established under the co-operative societies legislation but that is not the issue here.

The learned Counsel for the 2nd intervener submits that her clients had acquired *locus*

standi to argue their case *vis-a-vis* this application for directions by the receiver by virtue of the injunction orders issued against her clients. The injunction orders were issued against the 2nd intervener and 16 others at the instance of the receiver and the 1st intervener on the ground that no leave of the court was obtained before proceeding to garnish the stakeholder's of RM1,144,482.10. The receiver and the 1st intervener contended that the proceeding against the receiver constitutes an interference with the receiver's discharge of duties.

Numerous authorities were cited in favour of and against this argument. I will examine and discuss the cases which are relevant.

Both the learned Counsels for the receiver the 1st intervener claim that they are entitled to the injunction orders against the 2nd intervener and 16 others and for payment back of whatsoever sums paid out. The case of *De Winton v. The Mayor of Brecon* [1859] 28 Beav. 200 was cited as authority for the proposition. In that case it was held that a judgment creditor (Mrs. Payne) cannot (without leave of this court) attach moneys in the hands of its receiver, which have been directed to be paid by him to the judgment debtor (Corporation of Brecon). At issue was a motion by the corporation of Brecon against Mrs. Payne who had a mortgage made by the corporation over the tolls income. The Act of Parliament (1 Vict. c.12, s. 34) governs how the income from the tolls of Brecon Market were to be applied. It was decided the priority of payment ranked as follows:

1. the Corporation of Brecon ranked first in line;
2. De Winton with other debenture creditors;
3. Mrs. Payne's mortgage ranked last.

The order also ordered the receiver to pay annually to the treasurer of the Corporation of Brecon, of the tolls etc. such sum received from the rents and profits from the other property as would make up the sum of £210. This order was granted in line with relevant statutory provision. The Act provides that "after payment" of certain charges on it, the tolls are to be applied in making up the £210 a year to the Corporation. Out of the sum of £210 a competent part is to be applied by the corporation towards defraying the interest of any incumbrance then affecting their property". The Act further provides that "the remainder shall be by them (the Corporation) to such purposes and in such manner as they are by law now authorised and empowered to apply their said net annual income ..." and afterwards the surplus etc., shall be applied in paying the interest of all moneys borrowed under and by virtue of and for the purposes of this Act". It was a finding, on both fact and law, that Mrs. Payne's debt could only come in under the last clause, if at all.

Furthermore the executors of Mrs. Payne, being parties to the original suit and to the order, ought to have asked the original Court for variation of order and failure on her part to do so cannot now bring a complaint in another court.

There are numerous factors which can be distinguished in *De Winton's* case as distinct from the present case. For example, there is a set pattern of priority ranking of payment-out of debts not so provided under our Partnership Act 1961. In the set pattern of priority ranking for payment, the garnishor ranked last. The Act allows only the Corporation (no one else) to apply "the remainder etc ..." to such purposes and in such manner as they are by law now authorised and empowered to apply their said net annual income. For the Court to allow Mrs. Payne's executor to payment in priority over another duly entitled under the order would be to condone a breach of the order to which they were party thereto.

Nevertheless it was held to the effect that Mrs. Payne's garnished debt taken out without leave was not altogether wrong. It was ruled that her claim had gained priority as a garnished debt to rank rateably in line with the debenture-creditors, but she cannot obtain payment forthwith thereon.

This is not the case here. For this reason I am of the view that the *ratio* of *De Winton* cannot apply to the 2nd intervener's case and the others.

The learned Counsel for the 2nd intervener submits that it cannot be the rule that in every case where a proceeding against a receiver is taken out, whether in a garnishee proceeding or otherwise, that leave of the court is required.

The cases of *Yates v. Terry* [1902] IKB 527 (a dissolved partnership case) and *Re Cowan's Estate Rapier* [1880] Vett 638 (an estate administration case) were referred as illustration of instances of garnishment orders being issued

against funds due to or in the receiver's hands. In the two cases the court did not require leave of the court before proceeding with the garnishment.

I am sure that if leave of the Court is required in all garnishment proceedings taken out against the receiver, the rules of procedure would have provided for it. Order 46 r. 2(1) of the Rules of the High Court provides that a writ of execution to enforce a judgment or order may not issue without the leave of the court in the cases listed under the rule. However the rule conspicuously and specifically omitted to include a garnishee proceedings from rule. In the event the rule with regard to leave to enforce any judgment or order will not apply to garnishee proceedings.

I must assume that our rules to-date are, nearly as possible, a codification of the common law position.

On the other hand my attention was drawn to certain extracts from texts written by English authors on the law of receivers. In particular my attention was drawn to a passage in **Managers and Administrators**, (Butterworths 2nd Edn. 1990) by Hubert Picarda BCL, MA (Oxon) who at p. 380 quoted Lord Romilly in *Ames v. Birkenhead Docks Trustees* [1855] 20 Beav 332:

> There is no question but that this Court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this Court requires and insists that application should be made to the Court, for permission to take possession of any property of which the receiver either has taken or is directed to take possession.

The learned writer went on to draw a final conclusion from the above judicial pronouncement of Lord Romilly,

> It follows from this that any interference with the possession of the receiver without leave of court is a contempt.

With respect I find this sweeping statement of the learned writer misleading and not a true reflection of the judicial reasoning dealt with in decided cases.

In *Ames v. Birkenhead* the court was most concerned about the effect in the use of garnishee proceedings by a judgment creditor to gain priority unlawfully over the rights of priority ranking in payment of the mortgages of the tolls of Birkenhead Docks.

Basically Lord Romilly had held that what the garnishor therein had to garnish in the hands of the receiver were merely the judgment debtor's interest *vide* "an equity of redemption subject to the payment of the mortgage".

Furthermore the terms of the order and directions to the receiver were clear and specific, that is;

> to pay into court half-yearly such balances, if any, as might remain in his hands, after payment of the expenses of carrying on the business and the interest then due and to become due on the mortgages.
>
> And the receiver was not to account otherwise, until the further order of the Court.

With all this consideration in mind it would be a diversion of justice to allow the garnishee proceedings to proceed. That was the consideration which led Lord Romilly to make the *obiter* statement as was quoted. Much rest on the circumstances of the cause.

My attention was also drawn to the case of *Re Cowan's Estate (supra)*. The 1st intervener sought to distinguish the case as an administration of estates and therefore should not apply. However the fact remains that is a case of garnishment proceedings taken against funds in the receiver's hands or otherwise accruing thereto.

In *Re Cowan's Estate* the objection raised by the receiver was that the fact that the fund is payable under an order of court - the court having taken possession of it - prevents that income from being subject to attachment.

Hall V.C. held that such an argument is "unsubstantial" and "altogether wanting in justice". In his *ratio* the learned Judge held at p. 643:

> that the rules (garnishee) are applicable to a fund payable under an order of the Court, but in the hands of a receiver, just as much as if the fund, were not in Court, but in the hands of a trustee whose duty it was to pay it over to the debtor.

and further at p. 644:

> the *order nisi* which has been obtained rightly extended not only to the money actually in the hands of the receiver, if there were any at the time when it was made, but to future payments as well.

I am unable to follow the learned author's conclusion on the judicial pronouncement of Hall V.C. when he stated at p. 382 that:

> In *Re Cowan's Estate*, however, attachment of money not yet in the receiver's hands was not subverted by the existence of a receivership.

It would appear that the writer is trying to reconcile why *Re Cowan's* principle does not at all conform with the sweeping statement he had made when he considered *Ames v. Birkenhead*.

It may be that the writer is trying to explain that the principle in *Re Cowan's Estate* is to the contrary because since funds have not come to the receiver's hands it is in order to garnish it. But that was not the case at all in *Re Cowan's Estate*. In the light of the conflicting views perhaps it is time that some of the texts on the law of receivers and receivership ought to be reviewed and rewritten.

What is the judicial principle to apply to the law of receivership in partnership actions upon a dissolution of a partnership?

My attention has been drawn to the case of *Mitchell v. Weiss* [1892] WN 139 a classical case cited in the Supreme Court Practice of UK. The *obiter dictum* of Chitty J. reads:

> that a suit between partners for winding up the partnership business was a suit between the parties themselves in their own individual rights and that the creditors of the firm had no interest whatever in such action ...
>
> But that where a creditor was in a position to levy execution against the assets of the firm he might apply to the Court for leave to do so, notwithstanding the appointment of a receiver, and on such application either leave would be given, or in the interest of the partners themselves an order would be made, directing the receiver to pay, so as to avoid a sale by the sheriff.

The judgment creditor in this case applied for either payment of his debt and costs or for liberty to levy execution notwithstanding the appointment of the receiver. An order was made for the receiver to pay to the judgment creditor his debt and costs.

It appears that the judicial rationes in *Mitchell v. Weise* [1886] Ch. D 345 applies in addition to and apart from the principles as laid down in the line of authorities of *Kewney v. Attrill* [1886] Ch. D 345, *Ridd v. Thorne* [1902] 2 Ch. 344. This principle was extended in *Newport v. Pougher* [1936] 1 Ch. 214 where the judgment creditors of the dissolved firm, upon their application to the original court for leave to levy execution on assets in the receiver's hands for a seizure and sale, obtained a charging order on the fund in court and moneys in the hands of the receiver in the form made in *Kewney v. Attrill*. Such a charging order gave the judgment creditors priority over the general body of creditors.

It was pointed out to me that in the case of *Hwang Ju-In v. Huang Han Chao* [1977] 2 MLJ 229, the Supreme Court ruled that since there was no co-operation at all between the parties in the partnership it was therefore desirable that an independent third party, such as a receiver, take over the affairs of the partnership. It can be concluded that the object of the court to appoint a receiver in a partnership action upon its dissolution is the protection of the partners' interests.

In the light of Chitty J.'s *obiter* in *Mitchell v. Weise*, the emphasis is

> ... in the interest of the partners themselves an order would be made, directing the receiver to pay, so as to avoid a sale ...

The partners' interests appear to be of paramount consideration.

In my view to issue the injunctions at the instance of the receivers in the present case against the judgment creditors of the firm and direct them to levy execution against the partners individually, would not be in the partners' interest.

Section 41 of the Partnership Act 1961 provides

> every partner is entitled as against the other partners ..., to have the property of the partnership applied in payment of the debts and liabilities of the firm ...

In **Halsbury's Laws** (4th Edn.,) Vol. 39 at p. 451-452 dealing with the topic of 'Interference with the possession of a receiver' gave several examples of instances considered as interference but the only relevant example of an interference in respect of partnership position is "by levying an execution upon partnership assets in the possession of a receiver". The case of *Lane v. Sterne* [1862] 3 Giff 629 is cited as authority.

Lane v. Sterne is a case of levying execution by way of writ of fifa in which case the statutory requirement for leave is mandatory. This case

can therefore be distinguished from the 2nd intervener's case before me.

From the authorities that have been considered it would appear to me that there is no legal impediment to the 2nd intervener to proceed with the garnishee proceedings.

The last point raised by the learned Counsel for the receiver is whether the word "rateably" should be read into s. 46(b)(i) of the Partnership Act 1961. If the word "rateably" is so read the receiver can justify his stand that all creditors should now wait in line for a *pari passu* distribution.

In my view it should not. If Parliament had intended the section to mean *pari passu* distribution of partnership debts, it would have expressly stated so. I can only conclude that the omission is deliberate and that Parliament never intended to import the word "rateably" into s. 46. Moreover our s. 46 was adopted *in toto* from the equipollent s. 44 of the English Partnership Act 1890, save and except that we have an additional word "and" at the end of s. 46(a).

Section 44 of the English Partnership Act 1890 was an exercise to restate by statute the English common law position on partnership up to that period. By virtue of s. 5 of the Civil Law Act 1956, we have adopted this provision in our Act. Similarly we have re-enacted the English s. 39 into s. 41 of our Partnership Act. The cases of *Wong Pot Heng v. Zainal Abidin Putih, Re Rudd & Son Ltd.* and *J. Kahn v. Alli Mahomed* must be distinguished from this case.

It was submitted that in *Wong Pot Heng* the Supreme Court decided in favour of *pari passu* distribution among all liabilities of CCB. Under regulation 13 of the Essential (Protection of Depositors) Regulations 1986, it was held that the receivers have priority to all other claims. Since there is no express provision to provide for priority of payments to depositors, the Court declined to read into the laws a provision that depositors must be given priority over other creditors. However that case is under the Co-operative Societies Act 1948. It cannot be equated to be similar to the case under the Partnership Act 1961. I am sure the situation in a dissolved partnership cannot be the same as in a Co-operative Society which is a body corporate. Unless there are provisions in the two legislations which may be similar and relevant to the issue at hand I do not see how the principle of *pari passu* distribution for all liabilities of the firm as decided in the *Wong Pot Heng* case can apply in the present case.

It was further urged that the Court should apply the principle of *pari passu* distribution into s. 46(b) of our Partnership Act following the principle as established in the Indian case of *J. Kahn (supra)*. I do not think *J. Kahn's* case can be regarded as persuasive authority. Firstly, there is no similar s. 46 in the Indian Act. The equivalent s. 41 in the Indian Act is not in *pari materia* with our s. 46. Secondly, the decision of Farran J. is not based on any legal authority and without reasoned judgment. In his judgment the learned Judge said,

> It cannot be that, in this state of things, a Court of equity will allow one out of the whole body of creditors to gain priority over the remainder by the simple expedient of attaching the moneys in the Court's hands.

With respect I am of the view that in a situation where a partnership is dissolved equity will apply in favour of the partners to protect the partners' interest. While there are still funds in the partnership property they should first be applied to pay off pressing debts in lieu of asking such creditors to go against the partners in bankruptcy or in execution. Thirdly, the order which was decreed by the Court is different from the order in the present case. In that case there was no direction to take accounts of the debts and liabilities of the said partnership for payment out.

The learned Counsel for the receiver relied heavily on *Re Rudd*. However I am unable to be persuaded by the authority. The *ratio* in the headnotes read:

> On the winding up of a partnership carried on by two companies, the creditors of the partnership have, with respect to the partnership assets, priority over the creditors of the individual corporate partners either because of s. 33(6) of the Bankruptcy Act 1914, which accords such a priority to partnership creditors, or because of a rule of convenience to the like effect. As between themselves the partnership creditors rank *pari passu*.

Section 33(6) of UK 1914 Act is the equipollent section of our s. 43(3) Bankruptcy Act 1967 which reads:

> In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of

each partner shall be applicable in the first instance in payment of his separate estates, it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

The effect of this subsection is to provide that creditors of the partnership shall, in regard to the partnership assets, have priority over the creditors of an individual partner.

With respect, *Re Rudd* is a case decided in 1984 and under s. 5 of the Civil Law Act 1956, the Courts in this country are not obliged to apply English law after 7 April 1956 unless the case is in *pari materia* to the case before the court. In *Re Rudd* it was an application by the Court of s. 33(6) of their Bankruptcy Act read with s. 317 of their Companies Act 1948. It deals with the insolvency of a partnership on account of the liquidation of its only two corporate partners. The partnership was in a hopelessly insolvent state with a fixed limited funds for payment of debts. In *Re Rudd* therefore the facts are not in *pari materia* with the present case. The issue there was which group of creditors gets priority for payment - the partnership creditors or the partner's (Companies) creditors? The issue does not arise in this case.

The English equipollent section of our s. 46 was not discussed nor applied at all. Instead the Court applied the bankruptcy provisions, although such provisions ought to be applied to individual partners only, to come to the conclusion for a *pari passu* distribution for all creditors both of the partnership and of the corporate partners.

I do not see how s. 43 of the Bankruptcy Act 1967 can be applied for a *pari passu* distribution here. The present case is not similar to *Re Rudd*. There is no evidence before me that all partners are bankrupt and neither is the firm a bankrupt. In any event a dissolved firm cannot be said to be a bankrupt.

The authority cited by the intervener does not therefore answer the question asked.

However in the light of the *obiter* of Chitty J. in *Mitchell v. Weise* and reading s. 41 with s. 46 of the Partnership Act 1961, it is in the interest of the partners and for their protection that such debts be paid notwithstanding the appointment of a receiver. The debts owing to the 2nd intervener must be considered as pressing and payment out would avoid execution of the debts against the individual partners.

In the event, I give the answers to the questions posed as follows:

1. I hold that s. 46(b) only covers legal debts and liabilities or otherwise sanctioned by the Courts.
2. I rule that the employee's claims under Labour Court case No. KBKL/286/90 do not have statutory priority as there is no evidence before me that the award made is covered under the provisos to s. 31 of the Employment Act 1955.
3. I further hold that leave is not required of this Court to proceed against the receiver in the case of the 2 interveners and 16 others on the facts as was submitted at length before me.
4. As regard the issue of costs, I would reserve it for submissions by Counsels at the end after I have dealt with the other applications in Encls. (161(b)), (168), (174) and (182).

Reported By K.L. Wong